82-135

No.

Office - Supreme Court, U.S.
FILED
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1982

SEARS, ROEBUCK AND COMPANY,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

JURISDICTIONAL STATEMENT

JOHN T. PIPER
D. MICHAEL YOUNG
JAMES H. LOWE

Counsel for Appellants

Office and Post Office Address:
BOGLE & GATES
2000 The Bank of California Center
Seattle, Washington 98164
Telephone (206) 682-5151

QUESTIONS PRESENTED

1. Is the use tax imposed by RCW 82.12.010(5) upon the distribution of certain publications "a tax laid specifically on the exercise" of First Amendment rights, and therefore unconstitutional?

2. Is Washington's narrow revenue interest in RCW 82.12.010(5) a sufficiently substantial government interest to justify infringement of commercial speech?

3. Is the tax imposed by RCW 82.12.010(5) unconstitutionally overbroad because it is susceptible of application to fully protected noncommercial speech?

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Grounds of Jurisdiction 2

Constitutional Provisions and Statutes 2

Statement of the Case 2

The Federal Questions are Substantial 3

I. Introduction 3

II. Washington May Not Impose a Tax Directly on the Exercise of Free Speech 4

A. Washington's Tax Impacts Speech Directly, Not Tangentially 4

B. The State May Not Directly Tax the Exercise of Free Speech 5

III. This Court Has Protected Commercial Speech Against State Interests Far More Powerful Than Washington's Weak Revenue Interest 7

IV. Washington's Tax Is Invalid On Its Face Because It Burdens Protected Noncommercial Speech .. 9

Conclusion 12

Page

TABLE OF AUTHORITIES

Table of Cases

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 8, 10, 11

Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) 9

Cantwell v. Connecticut, 310 U.S. 296 (1940) 10

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 8

Follett v. McCormick, 321 U.S. 573 (1944) 3, 5, 6, 7

Gooding v. Wilson, 405 U.S. 518 (1972) 11

Grosjean v. American Press Co., 297 U.S. 233 (1936) 5, 8

In re Primus, 436 U.S. 412 (1978) 9

Kunz v. New York, 340 U.S. 290 (1951) 10

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 4, 7

Minneapolis Star & Tribune Co. v. Commissioner, 314 N.W.2d 201 (Minn. 1981), *prob. jur. noted*, 50 U.S.L.W. 3994 (June 21, 1982) 4, 6, 7

Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973) . 9

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 3, 4-5, 6, 7, 9

Lewis v. New Orleans, 415 U.S. 130 (1974) 10

Libby, McNeill & Libby v. Ivarson, 19 Wn.2d 723, 144 P.2d 258 (1943) 6

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 8

Lovell v. Griffin, 303 U.S. 444 (1938) 4

NAACP v. Button, 317 U.S. 415 (1963) 11

Page

Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981) 4

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 8, 9

Young Men's Christian Association v. Parish, 89 Wash. 495, 154 P. 785 (1916) 6

Constitutional Provisions

U.S. Const. Amend. I ..... 2, 3, 4, 5, 7, *et seq.*

Statutes

RCW 82.12.010(5) ..... i, 1, 2, 4, 8, 9

RCW 82.12.020 2

28 U.S.C. § 1257(2) (1976) 2

28 U.S.C. § 2101(c) 2

1955 Wash. Laws 389 § 24 8

Other Authority

L. Tribe, *American Constitutional Law* (1978) 10

IN THE

Supreme Court of the United States

October Term 1982

SEARS, ROEBUCK AND COMPANY,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Sears, Roebuck and Company ("Sears")[1], appellant herein, appeals from the April 22, 1982 decision of the Washington Supreme Court upholding the constitutionality of RCW 82.12.010(5), which taxes distribution of commercial publications.

The Washington Supreme Court's opinion (A-1-5) is published at 97 Wn.2d 260, 643 P.2d 884 (1982). The opinion of the Thurston County Superior Court (A-7-15) is unreported.

---

1. The case caption contains the names of all parties. Sears has no parent company. Other than wholly owned subsidiaries, Sears owns at least 20% of the following companies: Universal-Rundle Corporation; Roper Corp.; DeSoto, Inc.; Kellwood Company; Armstrong Co.; Simpson-Sears Limited (Canada); Sears, Roebuck de Mexico, S.A.; and Sears, Roebuck de Venezuela, S.A.

GROUNDS OF JURISDICTION

The opinion of the court below was filed on April 22, 1982 (A-1). In Washington, no separate judgment is entered. The mandate was entered on May 17, 1982 (A-6).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2)(1976). Notice of appeal to this Court was duly served on July 14, 1982 and timely filed in the Washington Supreme Court on July 16, 1982 (A-18). *See* 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Statutes: The Washington use tax is imposed by RCW 82.12.020, which provides in pertinent part:

> There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within the state as a consumer any article of tangible personal property purchased at retail . . . .

The term "consumer" is defined in RCW 82.12.010(5), which provides in pertinent part:

> "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

STATEMENT OF THE CASE

Sears distributes catalogs to advertise its wares within Washington State. Washington assessed a "use" tax on that distribution — relying on a definition of "consumer" tailored to such a purpose. That definition, grafted on to the use tax statute by amendment, provides:

> "Consumer" . . . shall also mean any person who distributes . . . any article of tangible personal property . . . the primary purpose of which is to promote the sale of products or services. (RCW 82.12.010(5))

Sears commenced an action in Superior Court for Thurston County, Washington, for refund of use tax assessed and paid on the distribution of catalogs. That court awarded Sears partial summary judgment on an issue of statutory construction, from which neither party appealed. However, the trial court also held that the free distribution of commercial publications is not protected from taxation by the First Amendment to the United States Constitution. (A-12). The superior court granted the Washington Department of Revenue's Motion for Partial Summary Judgment on this constitutional issue (A-16), and the Washington Supreme Court affirmed (A-1-5). Sears filed a timely notice of appeal to this Court (A-18).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Introduction

In upholding the challenged tax, the Washington Supreme Court purported to apply this principle:

> A general tax which only tangentially impacts constitutionally protected speech is valid.

(A-2). The court concluded that the tax is "general", but utterly failed to address its premise that the tax "only tangentially impacts constitutionally protected speech." Instead, the court assumed the *non sequitur* that because a tax is "*general*" its impact on protected speech is automatically "*tangential.*" Answering the "general vs. special tax" question does not address, much less answer, the "direct vs. tangential impact" question which is critical here. The Washington Court's total failure to analyze its "tangential impact" assumption leaves its holding squarely in conflict with this Court's decisions prohibiting taxes imposed directly on the exercise of the free speech right.[2]

Where a restraint falls directly on commercial speech, this Court has given protection against state interests far more powerful than Washington's weak revenue interest. The

---

2. *See Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

court below did not even attempt the commercial speech analysis formulated by this Court.[3]

Finally, the statute's "primary purpose" test results in taxation of fully protected noncommercial speech — unconstitutional overbreadth ignored by the court below.

The Court may wish to consolidate this appeal with *Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W.2d 201 (Minn. 1981), *prob. jur. noted*, 50 U.S.L.W. 3994 (June 21, 1982) (No. 81-1839). In both cases a state supreme court has upheld a use tax imposed upon activities protected by the First Amendment on the ground that the tax is a general tax only tangentially impacting protected speech. Each appeal, however, also presents several unique questions, so that judgment in one appeal would not be dispositive of the other. The unique questions herein involve the directness of the impact, the infringement of commercial speech, and overbreadth.

II. Washington May Not Impose a Tax Directly on the Exercise of Free Speech.

A. *Washington's Tax Impacts Speech Directly, Not Tangentially.*

Distribution of a publication is speech.[4] It is on Sears' speech — the act of distributing its publication — that Washington imposes its specially designed use tax under RCW 82.12.010(5). The vice of the instant tax is, therefore, that it is imposed *directly on the exercise* of the free speech right.

The critical distinction is the one made by this Court in *Murdock v. Pennsylvania*:

> It is one thing to impose a tax on the *income* or *property* of a preacher. It is quite another to exact a tax from him for the *privilege of delivering a sermon.*

---

3. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

4. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245 (9th Cir. 1981).

319 U.S. 105, 113 (1943) (emphasis added). A tax on a speaker's income or property is constitutionally acceptable because its impact on speech, if any, is incidental or "tangential." Therefore, Sears claims no immunity from the ordinary forms of state taxation on sales, income or property which may indirectly affect its publications.[5] By contrast, the incident of the instant tax, like the one proscribed in *Murdock*, is the very act of speech itself. An impact could not conceivably be more *direct*.

B. *The State May Not Directly Tax the Exercise of Free Speech.*

This Court struck down an ordinance imposing a license tax on the privilege of distributing religious literature in *Murdock v. Pennsylvania, supra*, stating:

> It could hardly be denied that a tax laid *specifically on the exercise* of [First Amendment] freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.

319 U.S. at 108 (emphasis added).

This Court has consistently struck down taxes which burden the exercise of the First Amendment right to distribute publications. *See, e.g., Follett v. McCormick*, 321 U.S. 573, 577 (1944).

The Washington court upheld the instant tax solely on the ground that

> [T]his is a general tax for the support of government which under the test of [*Grosjean*] is not violative of the First Amendment.

(A-4). On that basis the court concluded that "there is no constitutional issue." (A-4)

---

5. *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Under the *Murdock* rule, the following taxes imposed on Sears would be "tangential" and proper: (i) Washington's tax on sales resulting from Sears' catalog advertising; (ii) local property tax on catalogs held by Sears within the state; (iii) state income taxation; (iv) a tax on the exercise of the selling privilege, if Sears should choose to sell its speech by charging for its catalogs.

But a tax applied directly to the transfer of information — to the exercise of the protected right — is not saved by being "general."[6] It would be absurd to say, for example, that a tax on a particular preacher's sermons could be saved by expanding it to all sermons or even to all speech. Nor can a tax on speech be redeemed by association with a broad tax on other subjects. The ease with which this tax on commercial speech was grafted onto Washington's general use tax illustrates the vulnerability of "protected speech" if general application were the sole test. The taxes proscribed in *Murdock* and *Follett* were *general* taxes (*i.e.*, not narrowed to particular persons or things), which nonetheless failed constitutional muster because their impact on protected speech was *direct*. Indeed, the Washington court's statement that "[a] general tax *which only tangentially impacts* constitutionally protected speech is valid" impliedly concedes that being "general" is not enough. The court erred by failing to follow its concession with an analysis whether the impact of Washington's commercial speech tax is direct or tangential, an issue which was fully briefed by both parties.[7]

---

6. A law can be "general" merely by not relating to *particular* persons (or things):

> The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions.

Libby, McNeill & Libby v. Ivarson, 19 Wn.2d 723, 730, 144 P.2d 258 (1943). *Compare Young Men's Christian Association v. Parish*, 89 Wash. 495, 154 P. 785 (1916) (statutory provision exempting YMCA exclusively and by name from state property tax held an unconstitutional "special" law).

7. In *Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W.2d 201 (Minn. 1981), *prob. jur. noted*, 50 U.S.L.W. 3994 (June 21, 1982) (No. 81-1839), the Minnesota Supreme Court held that application of a general use tax to the consumption of paper and ink to produce a newspaper subsequently sold to the public did not violate freedom of the press. While

By upholding a tax imposed specifically on speech, the Washington court has created a conflict with this Court's First Amendment decisions.

III. This Court Has Protected Commercial Speech Against State Interests Far More Powerful Than Washington's Weak Revenue Interest.

This Court has defined commercial speech as "commercial advertisements of goods and services for sale," and has held that such speech "enjoys a substantial degree of First Amendment protection . . ."[8] It is undisputed that Washington's tax impacts, and that Sears' catalogs contain, constitutionally protected commercial speech.

This Court requires the advancement of a "substantial government interest" to justify infringement of commercial speech,[9] and has protected commercial speech against

---

Footnote 7 (con't)

recognizing that *Murdock* and *Follett* involved general taxes, the *Minneapolis Star* court found those precedents inapposite because the case before it involved "the application of an ordinary use tax to revenue-producing, commercial activity throughout the state." 314 N.W.2d at 208. The Washington Supreme Court adopted the quoted language *verbatim*, ignoring two crucial distinctions between *Minneapolis Star* and the instant case. Whereas the *Minneapolis Star* newspaper was "revenue-producing", Sears' catalogs are distributed *free*. Even more importantly, the impact of the tax in *Minneapolis Star* was not *direct*, as it is here. *Thus*, if *Murdock* and *Follett* were inapposite in *Minneapolis Star* because the tax on a *revenue-producing activity* there *tangentially* touched speech, the same considerations make those cases controlling here. Both *Murdock* and *Follett*, like the instant case, involved general taxes *directly* impacting the *free* distribution of constitutionally protected literature.

8. *Metromedia v. City of San Diego*, 453 U.S. at 505.

9. This Court has adopted a four-part test for determining the validity of governmental restrictions on commercial speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. 453 U.S. at 507.

countervailing state interests far stronger than any asserted here. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[10] and *Bates v. State Bar of Arizona*,[11] powerful state interests in maintaining professionalism of pharmacists and lawyers, respectively, failed to justify restrictions on commercial speech. Racial integration [12] and energy conservation [13] have likewise failed to vindicate such infringements.

In contrast to these cogent public policy objectives, the instant statute is nothing more than a tool to raise money — weak in revenue impact but mighty in potential for First Amendment mischief. Indeed, a tax on advertising is one of the classic forms of the "taxes on knowledge" which the First Amendment was designed to forbid.[14]

We emphasize the narrowness of Washington's revenue interest. Sears does not seek to invalidate the entire Washington use tax — only the *incremental* revenue generated by RCW 82.12.010(5). That statute extends the tax's reach to publications by defining a "consumer" — not as one who reads or consults the publication — but as one who *distributes* it.[15] While the basic use tax has broad revenue impact, this extension of it does not. The revenue value of any tax, as it applies to speech, is inherently apt to be slight.

More importantly, a revenue interest is *categorically insufficient* to justify direct taxation of protected speech. As this Court has warned, "[t]he power to tax the exercise of a privilege is the power to control or suppress its

---

10. 425 U.S. 748 (1976).

11. 433 U.S. 350 (1977).

12. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

13. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

14. *See Grosjean v. American Press Co.*, 297 U.S. 233, 245-249 (1936).

15. This special definition of "consumer" was added by amendment. *See* 1955 Wash. Laws 389 § 24.

enjoyment."[16] Any attempt, therefore, to broaden the revenue value of a tax on speech (*e.g.*, by extending it from the "preacher's sermon" to all speech) is doomed to failure. The broader the revenue base, the greater the suppression of speech.

IV. Washington's Tax Is Invalid On Its Face Because It Burdens Protected Noncommercial Speech.

The tax applies to distributions of any publication, except newspapers, the "primary purpose of which is to promote the sale of products or services." RCW 82.12.010(5). Determining what is or is not speech whose purpose is sales promotion is not as straightforward as it may first appear. Defining "commmercial speech" as "speech proposing a commercial transaction,"[17] this Court has emphasized "the difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'"[18] "This line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw. . . ."[19] Professor Tribe's example captures the problem's essence:

---

16. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). In striking down such taxes, the courts have consistently distinguished a "nominal fee" imposed to defray the cost of administering legitimate regulation of First Amendment activity; where the taxing authority has not met its burden of proving that the tax was *limited* to that purpose, the tax has been held unconsitutional. *See Murdock v. Pennsylvania*, 314 U.S. at 113-114, 87 L.Ed. at 1299; *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 704-706 (M.D. Fla. 1978); *Moffett v. Killian*, 360 F. Supp. 228, 231-232 (D. Conn. 1973) (three-judge court). That fact is not surprising, since a revenue interest can be asserted on behalf of every tax, including every tax on speech which the courts have struck down. If that omnipresent interest could justify infringement of First Amendment rights, the Constitution would afford them precious little protection. Yet the Washington Department of Revenue has offered no other justification for the instant tax.

17. *Virginia State Board of Pharmacy, supra*, 425 U.S. at 762.

18. *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 539 (Brennan, J., concurring) (citing examples).

19. *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

> [I]s the coal company's ad proclaiming its concern for environment and warning of the hazards of nuclear fuel commercial speech or political expression?[20]

When a publication serves important noncommercial as well as commercial purposes, a state tax official must judge which is "primary" under Washington's statute. If a commercial purpose is deemed "primary," then the tax applies. That official thus determines what speech receives how much constitutional protection.[21]

If the use tax is imposed under the statute's "primary purpose" test, then the *entire* communication — both commercial and noncommercial content — is taxed. A religious tract may both proselytize and promote sales of religious literature and objects. An outfitter's catalog may advocate wilderness preservation and environmental legislation, in addition to promoting the sale of clothes and equipment. *All* such speech is subject to this tax.

Legislation susceptible of application to unconditionally protected speech is unconstitutionally overbroad and therefore invalid on its face.[22] The statute at issue is not

---

20. L. Tribe, *American Constitutional Law* at 656 (1978).

21. This Court has long recognized the danger of leaving to administrative officials the determination of what is protected speech. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court invalidated a statute requiring a license to solicit for religious causes. To condition the exercise of the protected right upon "a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. Vesting such discretion in administrative officials has been "consistently condemned" by this Court. *Kunz v. New York*, 340 U.S. 290, 293 (1951).

22. *Lewis v. New Orleans*, 415 U.S. 130, 131 (1974). This Court has suggested that overbreadth analysis "applies weakly, if at all, in the ordinary commercial context." *Bates v. State Bar of Arizona*, 433 U.S. at 380. We respectfully request the Court to distinguish two distinct types of commercial speech cases to determine whether overbreadth analysis may properly be invoked:

> (1) where the litigant's speech is *unprotected (e.g.*, obscenity, libel) and the allegedly overbroad statute also infringes "substantially

narrowly drawn to tax only commercial speech. It necessarily taxes noncommercial speech associated with commercial speech whenever a state tax official deems sales promotion the primary purpose of the publication.[23] Taxation of protected noncommercial speech is indisputably unconstitutional. Because the statue applies primarily, rather than exclusively, to commercial speech, it reaches too far into the area of fully protected speech.

Footnote 22 (con't)

protected" commercial speech (as opposed to *fully* protected noncommercial speech); and

2) where the litigant's speech is "*substantially protected*" commercial speech and the allegedly overbroad statute also infringes *fully protected* noncommercial speech (*i.e.*, the situation in the instant case).

It is well established that a *completely unprotected* speaker may invoke overbreadth analysis where a statute also infringes *fully protected* speech. *E.g., Gooding v. Wilson*, 405 U.S. 518, 520-522 (1972) ("fighting words"). It would be anomalous if a *completely unprotected* speaker, but not a *substantially protected* commercial speaker, could invoke overbreadth analysis — to challenge a statute also infringing fully protected speech. Therefore, the logical import of the *Bates* statement must be that *completely unprotected* speech may not trigger overbreadth analysis where the statute also infringes speech that is merely substantially protected commercial speech — the first situation outlined above. The instant case falls into the second category — an infringement of fully protected (noncommercial) speech — to which the overbreadth doctrine logically applies.

23. Whether Sears' speech is strictly commercial, or multipurpose, is irrelevant for overbreadth analysis. *See NAACP v. Button*, 371 U.S. 415, 432 (1963).

CONCLUSION

The decision of the Washington Supreme Court undermines fundamental First Amendment principles and conflicts with decisions of this Court. The questions presented by this appeal are substantial. Sears urges this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

John T. Piper*
D. Michael Young
James H. Lowe
of Bogle & Gates

Attorneys for Appellant
**Counsel of Record*

APPENDIX A

SEARS & ROEBUCK v. DEPARTMENT OF REVENUE Apr. 1982 97 Wn.2d 260

[No. 47821-0. En Banc. April 22, 1982.]

SEARS, ROEBUCK AND COMPANY, *Appellant*, v. THE DEPARTMENT OF REVENUE, *Respondent*.

[1] **Taxation — Freedom of Speech — Tangential Impact — Validity.** A tax of general applicability which has only a tangential impact on constitutionally protected speech is valid.

[2] **Taxation — Use Tax — Items Promoting Sales — Validity.** RCW 82.12.010(5), which makes the use tax applicable to the distribution of items other than newspapers to promote sales, is part of a general statewide tax for the support of government and does not violate the First Amendment.

[3] **Taxation — Use Tax — Distribution of Catalogs.** The distribution of catalogs to customers from retail stores within the state for the purpose of promoting sales is subject to the use tax.

NATURE OF ACTION: A company which sold merchandise through catalogs sought a refund for use taxes paid for its distribution of catalogs within the state.

SUPERIOR COURT: The Superior Court for Thurston County, No. 78-2-0054501, Frank E. Baker, Jr., on June 16, 1981, granted a summary judgment upholding the tax on catalogs distributed to customers from retail stores within the state and invalidating the tax on catalogs shipped directly to customers from out of state.

SUPREME COURT: Holding that application of the use tax did not violate the First Amendment, the court *affirms* the judgment.

Bogle & Gates, John T. Piper, D. Michael Young, and *James H. Lowe*, for appellant.

Kenneth O. Eikenberry, Attorney General, and *Jeffrey D. Goltz, Assistant*, for respondent.

DOLLIVER, J.—Between April 1968 and March 1977, plaintiff Sears, Roebuck and Company distributed catalogs in Washington for the purpose of promoting sales of its products. The catalogs described Sears' merchandise and listed the prices. Many of the catalogs were shipped from the printer in Chicago to customers in Washington by way of common carriers. The remainder of the catalogs were shipped from the printer to Sears retail stores in Washington and distributed to customers from the store.

The Department of Revenue assessed use taxes under RCW 82.12 for Sears use of the catalogs between 1968 and 1977. Sears paid the taxes and then filed the present action for a refund. The trial court held the catalogs shipped directly from the Chicago printer to Sears customers had not been "used" by Sears within the meaning of RCW 82.12. Sears' motion for summary judgment awarding it a refund for taxes paid on these catalogs was granted. No appeal was taken by the State. The court also held those catalogs shipped directly to Sears stores and then distributed to the customer over the counter or otherwise were subject to the use tax. Sears appealed from that portion of the judgment holding these catalogs subject to the use tax.

[1] In *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 80 L. Ed. 660, 56 S. Ct. 444 (1936), although the court struck down a Louisiana license tax on certain newspapers, it limited its holding by stating:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

A general tax which only tangentially impacts constitutionally protected speech is valid. *See Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W. 2d 201 (Minn. 1981); *Steinbeck v. Gerosa*, N.Y.2d 302, 313, 151 N.E.2d 170, 175 N.W.S.2d 1, *appeal dismissed*, 358 U.S. 38 (1958).

Sears claims, however, citing *Follett v. Town of McCormick*, 321 U.S. 573, 88 L.Ed. 938, 64 S. Ct. 717, 152

A.L.R. 317 (1944) and *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870 and 891 (1943), that the use tax is a tax on the exercise of free speech itself and is thus unconstitutional. These cases are not in point. *See Steinbeck v. Gerosa*, *supra* at 313. We concur with the analysis made by the Minnesota Supreme Court in *Minneapolis Star & Tribune Co. v. Commissioner*, *supra*, at 208, that the ordinances in *Follett* and *Murdock* required distributors or nonprofit sellers of religious material to pay a fee for a license to sell or distribute their material. Neither case considered the question raised here of the application of an ordinary use tax to revenue producing commercial activity throughout the state.

Sears next argues that its catalogs have been specifically taxed because, although the use tax is a tax of general application, a 1955 amendment to the use tax statute (RCW 82.12.010(5) singles out commercial catalog distribution and is thus subject to the constitutional infirmity first pointed out in *Grosjean*.

RCW 82.12.020 imposes a tax "for the privilege of using within this state as a consumer any article of tangible personal property . . ." Although the meaning of consumer has been subsequently broadened (RCW 82.04; RCW 82.08), prior to 1955 the legislature defined "consumer" as "[a]ny person who purchases, acquires, owns, holds or uses any article of tangible personal property other than for the purpose of resale as tangible personal property in the regular course of business . . ." Laws of 1949, ch. 228, § 2(r)(1), p. 816, 822.

In 1955, the legislature added the following language:

> "Consumer," in addition to the meaning ascribed to it in [RCW] chapters 82.04 and 82.08 insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

Laws of 1955, ch. 389, § 24(5), p. 1652. It is this language which Sears claims violates the First Amendment.

While the record indicates controversy as to the applicability of the pre-1955 language to catalogs shipped to the state and distributed by the taxpayer, it is the claim of the Department of Revenue that even without the 1955 amendment to the definition of "consumer", Sears is covered under the broad language of the pre-1955 definition as a "person" who "holds or uses . . . tangible personal property".

Furthermore, the partial stipulation of facts contains a copy of a letter from the Washington State Tax Commission (predecessor to the Department of Revenue) notifying Montgomery Ward and Company regarding the pre-1955 use tax. In that ruling, the Commission stated:

> We conclude that the Compensating [u]se Tax is applicable to the use within the State of Washington of those catalogs which are sent by rail to designated agents of Montgomery Ward in the State of Washington and which are then mailed to customers in Washington for use in this state.

We concur with the Department that the pre-1955 statute without the 1955 amendment language was sufficient to cover the transactions in this case.

[2,3] Even if we were to accept the argument of Sears that only after the 1955 amendment did the use tax apply to catalogs, we still would hold the tax to be valid. It is not contested that the 1955 amendment is part of the general use tax statute. *See generally Note, Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962). The 1955 amendment is part of a general statewide tax; it is not "single in kind". Neither the use tax nor the amendment is alleged by plaintiff to have a "long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Co., supra.*

We believe the record and the history regarding the application of the use tax to the Sears catalogs demonstrates this is a general tax for the support of government which under the test of *Grosjean v. American Press Co., supra*, is not violative of the First Amendment. Since this is the nature of the tax, there is no constitutional issue involved. Therefore, it is unnecessary to consider whether the "commercial

speech" which Sears claims it is exercising is afforded First Amendment protection or whether the statute is constitutionally overbroad since it might apply to noncommercial as well as commercial speech.

Affirmed.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, WILLIAMS, DORE, DIMMICK, and PEARSON, J.J., concur.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

SEARS, ROEBUCK AND COMPANY, Appellant,	)	MANDATE
	)	No.47821-0
	)	THURSTON
v.	)	County No.
THE STATE OF WASHINGTON,	)	782005451
	)	
DEPARTMENT OF REVENUE, Respondent.	)	DOCKETED
	)	

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 22, 1982, became the decision terminating review of this court in the above entitled case on May 12, 1982. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $132.78 in favor of respondent and against appellant.

cc:
Bogle & Gates
Mr. John T. Piper
Mr. D. Michael Young
Mr. James H. Lowe
Hon. Ken Eikenberry
Attorney General
Mr. Jeffrey D. Goltz, Asst.
Reporter of Decisions
Hon. Frank E. Baker, Judge
Thurston Co. Superior Court

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of May, A.D. 1982

/s/ JOHN J. CHAMPAGNE
Clerk of the Supreme Court, State of Washington

APPENDIX C

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SEARS, ROEBUCK & CO., Plaintiff,	)	NO. 78-2-00548-1
vs.	)	MEMORANDUM
STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	)	OPINION
	)	DOCKETED

This matter having come regularly on for hearing upon cross-motions for Partial Summary Judgment, and the Court having examined the file and exhibits therein, read the Partial Stipulation of Facts, studied all briefings offered the Court and having listened to oral argument on the issues, now enters its Memorandum Opinion as follows:

Three issues for determination have been presented to the Court for decision:

1. Whether this distribution of catalogs constitutes communication to customers and is thus protected by the First Amendment of the Const. of the U.S. from the State's imposition of the use tax.

2. Whether, under out statutes, plaintiff "uses" the catalogs as a "consumer," and/or whether such distribution of preaddressed catalogs sent from out of state is taxable under out statutes and the commerce clause.

3. Whether such distribution is protected from retroactive assessment if found taxable.

The material facts necessary for the Court's decision are summarized as follows:

Sears, the plaintiff, from April, 1968 to March, 1977, has distributed catalogs within this state to promote the sales of its products by communicating to potential customers what plaintiff has to sell and at what price. During this period, plaintiff would send a shipping order and address labels to the printer in Chicago who attached the labels,

bagged the catalogs and delivered them to a local common carrier for delivery to this state by the following methods:

1. *Common rail carrier to post office.* Catalogs designated for mailing to customers from the Spokane Post Office were shipped by common rail carrier. They were consigned to Sears in care of the United States Post Office which unloaded and mailed them.

2. *Common rail carrier to post office with assistance to post office by Sears employees.* Distributions through the Seattle Post Office were made in the same manner as at Spokane except that Sears employees assisted in the car unloading to speed it up. Post Office employees placed a Post Office conveyor inside the car. Several Sears employees entered the car and placed the bags of catalogs on the conveyor which moved them to the Post Office dock where Post Office employees removed them for placing in the mails.

3. *Common rail carrier to common motor carrier to Post Office.* For smaller cities in Washington the transport between the rail carrier and Post Office was provided by a common motor carrier. The catalogs were consigned to Sears in care of the motor carrier.

4. *Common rail carrier to distributing company.* The distributing company unloaded the catalogs from the rail cars and delivered them to customers. The catalogs were consigned to plaintiff in care of the distributing company.

Such catalogs were never diverted or recalled once the labels were sent to Chicago.

In February, 1960 defendant advised plaintiff in writing that plaintiff would not be held responsible for the use tax on the value of catalogs mailed direct to customers from outside the state. (Ex. 1) Thus no tax was assessed on methods 1, 2, and 3 for the period 1954 to 1967. (See ex. 2) However, the defendant has assessed use tax for the period 1967 to 1977. Since that time distribution has been made in the same manner as set forth in methods 1, 2, and 3 except as to 2 plaintiff employees no longer participate in the unloading.

COMMUNICATION—FIRST AMENDMENT

Va. Pharmacy Bd. Va. Consumer Council, 425 U.W. 748, has declared that "commercial speech" is protected by the First Amendment to the Constitution. Pharmacists like so many other professions which in the past have regulated themselves as to advertising, i.e., attorneys, physicians, etc., have now been declared as being free to advertise, in general, subject to subsidiary possible restrictions which are not material to this case. This case, in fact says nothing more. No question as to the taxation of "commercial speech" was in issue. The attack was on the constitutionality of a Virginia statute which provided in part:

> "Any pharmacist shall be considered guilty of unprofessional conduct who (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium discount rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

The United States Supreme Court held that this bar was violative of freedom of speech by way of communication to the public and thus protected by the First Amendment — "it does no more than propose a commercial transaction." The Court in concluding its opinion stated however, that "commercial speech, like other varieties, is protected, but we do not hold that it can't be regulated in any way."

> "What is at issue is whether a State may completely supress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients .... we conclude the answer to this one is in the negative."

Linmark Associates Inc. v. Willingboro, 431 U.S. 85 involved an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as the flight of white homeowners from a racially integrated community. The Court held the ordinance as violative of the First Amendment, citing the *Virginia Pharmacy* case, *supra*, to

the effect that such action restricted the free flow of truthful commercial information. The Court did point out that there could be differences under the First Amendment protection depending upon the restriction of a given form of commercial enterprise. That Court stated that in *Virginia Pharmacy, supra*, it was argued that such prescription advertising would reduce the prestige of the profession and in turn, the health and safety of the public. However, they held that such a ban on advertising was insufficient or unnecessary to achieve the goal when in fact, it restricted the free flow of truthful information. Thus the same result in *Linmark, supra*.

> "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Certainly these two cases discussed in some detail do not hold that one engaged in "commercial speech" is not subject to proper general taxation within a class unless we are willing to hold that any taxation, no matter how legitimate or necessary restricts the free flow of truthful information.

Thus we must turn to *Grosjean v. American Press Co.* 297 U.S. 233. There it was held that a state license tax imposed by statute upon the owners of newspapers for the privilege of selling or charging for advertising therein, and measured by a percent of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, was unconstitional. It was a special tax directed to a select few, and would seem obviously unconstitutional. The restriction of freedom of the press to immunity from censorship was cured by the First Amendment, and was adopted primarily to negate any form of previous restraint upon printed publications or their circulation, including restraint by the taxation of newspapers and their advertising.

Grosjean, supra, concluded however, that

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary tax,

> but one single in kind, with a long history of hostile misuse against the freedom of the press . . . . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

Let us turn next to *H & B Communications Corp. v. Richland*, 79 Wn. 2d 312 which involved the collection of a B & O tax from the appellant who operated a community antenna television system. Richland enacted an ordinance which levied such tax on the business of "transmitting" television by cable. The tax was based on a percentage of the gross income from the business. The taxpayer transmitted television programs to the listener-viewer via a coaxial cable and carried programs originating from eight television stations and three FM radio stations. The programs involved national and local news broadcasts, religious broadcasts, communications originating from governmental agencies and educational programs which were federally subsidized. For these services the viewer paid a monthly fee.

The court held that even though such such activity constituted interstate commerce that in itself did not negate the tax, the court applying both the discrimination test and the multiple burden test. The Court went on:

> "It is argued that the Richland business and occupation tax abridges the First Amendment freedoms of speech, press and religion as guaranteed by the United States constitution. In support of this contention, appellant relies heavily upon Grosjean v. American Press Co., 297 U.S. 233. Therein the Court said in part:
>
> > "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the of the ordinary forms of taxation for support of the government."
>
> Furthermore, in the case at bar there is not any suggestion of the tax being a pretext to impose

> censorship. Grosjean does not support the position of the appellant. The First Amendment freedoms of speech and press are not abridged by the business and occupation tax in question."

The Court concluded by summarily denying arguments involving the equal protection and due process clauses of the constitution.

This court is well aware that the expansion of "commercial speech" to be under the First Amendment umbrella as exemplified by *Virginia Pharmacy, supra*, and *Linmark, supra*, are subsequent decisions to *H & B Communications, supra*. Nevertheless this Court is being asked to hold that such protection exempts Sears from the general taxing powers of the State. I do not believe that in light of Washington decisions I can go that far. Thus we must look to the legitimacy and imposition of the use tax as it applies to the facts of this case.

STATUTES—USE—CONSUMER

Before the Court discusses the issues resulting from the imposition of the use tax upon plaintiff, it is necessary to set out the pertinent statutes as they relate hereto, as follows:

RCW 82.12.020:

> "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, . . . This tax will not apply with respect to the use of any article of tangible personal property purchased, . . . outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state . . . ."

RCW 82.12.010(2) defines "use:"

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage,

> or any other act prepatory to subsequent actual use or consumption within this state;"

RCW 82.12010(5) which provides:

> "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property . . . of which is to promote the sale of products or services."

Finally we must examine RCW 82.04.050(5) defining a retail sale:

> "'Sale at retail' or 'retail sale' means every sale of personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person . . ."

There is no problem herein concerning the taxing of those catalogs which are sent directly to the Sears stores and then distributed to the customer over the counter or otherwise. In such case the use tax attaches to the value of the catalogs, for not only has there been "dominion and control" over the article but likewise the transportation has "finally ended." It is also clear that under the present definition in RCW 82.12.010(5) that Sears became a "consumer" by its advertising process.

However, as to methods (1), (2), and (3) initially set forth in this option we have a different situation. It should be remembered that these catalogs upon leaving Chicago have never been diverted or recalled at any time. They are sent through the mails with short pauses while in the custody of the Post Offices for further distribution to the addresses, the ultimate users of the catalogs. It is difficult for the Court to envision a practical dominion or control as intended by the legislature which occurs during the transporting process directed by the United States Post Offices or other common carriers within the State for further distribution. To do so would necessitate the finding that there is some form of agency between the plaintiff and government or other common carriers.

The Court also believes that it must harmonize the statutes cited if at all possible. The transporting from out of state and distribution pauses fall short of the exception to RCW 82.12.020—"until the transportation of such article has *finally* ended." It only makes sense that such articles are not "used" within the state until dominion and control are at the direction of Sears for the purpose intended, namely the advertising of the products and their prices. Prior to that time the articles are still in interstate transit.

Pope & Talbot v. Revenue, 90 Wn. 2d 191 concurs with this Court's interpretation, in that "we do not depart from the ordinary meaning of the words in a statute absent some ambiguity and/or statutory definition." The exception in .020 is not ambiguous and the Court is of the belief that "final" means just what it says before such transit can be relieved of its interstate character. *Pope & Talbot, supra*, in discussing the airplane in that case is analogous to the fact pattern at bar. There our Supreme Court stated:

> "Whatever might constitute the final end of any airplanes journey, it can hardly be said to occur every time the plane lands. The word "final" connotes something more ultimate and substantial than that."

This Court holds that the transporting under the facts of this case do not constitute the first act by which dominion and control is assumed and further that the exception is applicable for such transportation has not finally ended. There is such inconsequential difference in the modes of transportation under methods (1), (2) and (3) that my ruling applies to all three.

The Court has also studied the question of estoppel or retroactive assessment. Although not necessary to the general holding of the Court, it is quite obvious that in examining the Exhibits in this cause that should the Court be in error in its holding, certainly the tax could only attach in the future. All other points raised in argument I believe to be disposed of by this Opinion.

The Court will sign the appropriate pleadings upon presentation.

Dated this 19 day of November, 1980.

/s/ Frank E. Baker
FRANK E. BAKER, JUDGE

APPENDIX D

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SEARS, ROEBUCK AND CO., Plaintiff,	)	NO. 78-2-00545-1
	)	ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	)	

This matter came on regularly for hearing before the above-entitled Court on September 15, 1980, on the cross motions of Plaintiff and Defendant for partial summary judgment with respect to use tax on Plaintiff's catalogues. The Court considered the partial stipulation of facts and exhibits thereto; the opening and reply briefs of the parties; the amended notice of appeal of Plaintiff; Defendant's answer and counterclaim; heard the argument of counsel; and on November 19, 1980, entered a Memorandum Opinion stating its decision on these matters.

In accordance with its previous Memorandum Opinion, the Court now makes this its Order with respect to the issues raised by the above-described motions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT, there being no genuine issues of material fact with regard to the methods of distributing Plaintiff's catalogues in this state and with regard to the Department of Revenue's prior rulings on the taxability under Chapter 82.12 RCW of Plaintiff's catalogues, the parties are respectively entitled to judgment as a matter of law as follows:

(1) That with respect to the claim alleged in ¶ 9A of Plaintiff's amended Notice of Appeal, use tax on Plaintiff's catalogues distributed within this state is not barred by the

freedom of speech provisions of the First Amendment to the United States Constitution. Plaintiff's motion for partial summary judgment in this regard is therefore Denied and the motion of Defendant for dismissal of said claim is Granted;

(2) That with respect to the claim alleged in ¶ 9B of Plaintiff's amended Notice of Appeal, use tax on Plaintiff's catalogues distributed in the manner described in ¶ 4 of the Partial Stipulation of Facts is prohibited by the provision of RCW 82.12.020 which states that the tax shall not apply until transportation of the taxed goods has finally ended and is also prohibited because such distribution does not constitute a taxable use of the catalogues. The motion of Defendant for dismissal of this claim is therefore Denied and the motion of Plaintiff for partial summary judgment in this regard is Granted; and

(3) That Plaintiff is entitled to judgment awarding refund of use taxes paid on catalogues distributed in the manner described in ¶ 4 of the partial stipulation of facts and Defendant is entitled a judgment dismissing the claim asserted in ¶ 9A of Plaintiff's amended notice of appeal.

DONE IN OPEN COURT THIS 20th day of April, 1981.

/s/ Frank E. Baker
FRANK E. BAKER, JUDGE

Presented By:

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ Michael Madden
Michael Madden
Assistant Attorney General
Attorneys for Defendant.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEARS, ROEBUCK AND CO., Appellant,	)	NO. 47821-0
v.	)	NOTICE OF
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	)	APPEAL

Notice is hereby given that Sears, Roebuck and Co., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington, entered on April 22, 1982, affirming the judgment of the Thurston County Superior Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 14th day of July, 1982.

BOGLE & GATES

/s/ John T. Piper

John T. Piper
D. Michael Young
James H. Lowe
Attorneys for Appellant

Bogle & Gates
The Bank of Calif. Ctr.
Seattle, WA 98164
(206) 682-5151

Office - Supreme Court, U.S.
FILED
AUG 2[illegible]
ALEXANDER L. STEVAS,
[illegible]RK

No. 82-135

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

SEARS, ROEBUCK AND COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

KENNETH O. EIKENBERRY
Attorney General,
State of Washington,

LELAND T. JOHNSON

JEFFREY D. GOLTZ
Assistant Attorneys General
Attorneys for Appellee

Office and Post Office Address: Temple of Justice
Olympia, Washington 98504. Telephone: (206) 753-2528

[illegible] PRINTING PLANT [illegible]

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF THE CASE	2
THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION AS THE DECISION BELOW RESTS PRIMARILY ON AN ADEQUATE NON-FEDERAL BASIS	2
ANY ARGUABLE FEDERAL QUESTION IS SO INSUBSTANTIAL THAT THE CASE DOES NOT MERIT CONSIDERATION OR FURTHER ARGUMENT	9
A. THE COMMERCIAL SPEECH DOCTRINE DOES NOT APPLY TO THIS CASE	9
B. THE STATUTE IN QUESTION IS NOT OVERBROAD	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 11

Buckley v. Valeo, 424 U.S. 1 (1976) 6

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 8, 10

City of Corona v. Corona Daily Independent, 115 Cal.App.2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953) 7, 8

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 6

Follett v. McCormick, 321 U.S. 573 (1944) 6, 7, 9

Giragi v. Moore, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937) 7, 8

Gooding v. Wilson, 405 U.S. 518, 521 (1972) 11

Grosjean v. American Press Co., 297 U.S. 233 (1936) . 7, 8

Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937) 4

Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) 7

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 9

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, ___ U.S. ___, 102 S. Ct. 2955 (1982) 5, 6

Morrison-Knudsen Co. v. State, 64 Wn.2d 86, 390 P.2d 712 (1964), *appeal dismissed, cert. denied*, 379 U.S. 649 (1965) 3, 4

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 6, 7, 8, 9

Sears, Roebuck & Co. v. State, 97 Wn.2d 260, 643 P.2d 884 (1982) 2, 4

Steinbeck v. Gerosa, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) ... 7, 8

Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., ___ U.S. ___, 102 S.Ct. 1186 (1982) 12

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment I 2, 5, 7, 10
U.S. Constitution, Amendment XIV 2

STATUTES

RCW 82.12.010(2) 3
RCW 82.12.010(5) 4
RCW 82.12.020 3
RCW 82.12.0252 ..... 3, 4
RCW 82.12.035 3
RCW 82.12.040 5
Chapter 389, §24, 1958 Wash. Laws 4

ADMINISTRATIVE REGULATIONS

WAC 458-28-100 11

No. 82-135

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

SEARS, ROEBUCK AND COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE WASHINGTON SUPREME COURT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves to dismiss this appeal on the grounds that it does not present a substantial federal question and that the decision below rests on an adequate non-federal basis.

Alternately, appellee moves to affirm the decision of the Supreme Court of Washington on the ground that the questions raised by the appellant are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

As will be elaborated below, Sears misstates the nature and incidence of the tax at issue in this case. It is not a "commercial speech tax" as stated by Sears. Juris. St. at 6. Rather, the tax is on "use" of tangible personal property, which includes acts other than the "distribution" of Sears catalogs, as described by the appellant. See pp. 3 through 5, *infra*.

The Washington Supreme Court affirmed the decision of the Superior Court on the issue of whether the tax imposed on Sears' use of its catalogs violated the first amendment to the United States Constitution as made applicable to the states through the fourteenth amendment. In its decision, the Washington Supreme Court, as a matter of state law, construed the tax as applicable to Sears' use of its catalogs in that Sears is a "'person' who holds or uses * * * tangible personal property.'" *Sears, Roebuck & Co. v. State*, 97 Wn.2d 260, 263, 643 P.2d 884, 886 (1982), Juris. St. at A-4. Because the Washington court determined that the tax in question was not one levied upon an act of speech, including any act of distribution of catalogs, the Washington court upheld the tax without reaching the commercial speech or overbreadth issues raised by Sears. This appeal followed.

We argue, first, that there is no substantial federal question as the decision below rests primarily on an adequate non-federal ground, and second, even if there is a federal question, that question can be resolved simply under existing precedent without the need for further consideration or argument.

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION AS THE DECISION BELOW RESTS PRIMARILY ON AN ADEQUATE NON-FEDERAL BASIS

Sears argues that the Washington Supreme Court erred by asserting that the use tax at issue only

tangentially impacts speech without assessing the impact of the tax on commercial speech. Juris. St. at 6. Sears, however, misstates existing constitutional doctrine and mischaracterizes Washington's use tax.

By characterizing the tax which is involved in this case as a "tax applied directly to the transfer of information," Juris. St. at 6, the appellant assumes what the Washington Supreme Court rejected. The use tax at issue is not a tax on speech; it is not a tax on the transfer of information; nor is it a tax on distribution of Sears catalogs. It is a tax on "use" of tangible personal property. RCW 82.12.020.[1]

The use tax is a complement to the retail sales tax, chapter 82.08 RCW, in that there is no use tax levied if the user has paid a sales tax, in the amount of the use tax, either to Washington or to another state. RCW 82.12.0252; 82.12.035. The term "use" is defined broadly to include

> [t]he first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and [includes] installation, *storage, withdrawal from storage*, or any other act preparatory to subsequent actual use or consumption within the state.

RCW 82.12.010(2) (emphasis added).

In other words, once the catalogs arrive in Sears' warehouse for storage, before distribution to any of Sears customers, they are, without more, already subject to the use tax. This plain meaning construction of the statute was confirmed by the Washington Supreme Court in *Morrison-Knudsen Co. v. State*, 64 Wn.2d 86, 390 P.2d 712 (1964), *appeal dismissed, cert. denied*, 379 U.S. 649

---

[1]RCW 82.12.020 states in part:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7).

(1965),[2] and its constitutionality upheld by this Court in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937).

However, the appellant cites a 1955 amendment to Washington's use tax laws which expressly included within the definition of "consumer," for the purposes of use tax, "any person who distributes * * * any article of tangible personal property, except newspapers, * * * the primary purpose of which is to promote the sale of products or services." Chapter 389, § 24, 1955 Wash. Laws, *now codified as* RCW 82.12.010(5). By its terms, that statute only includes within the definition of consumer a type of person who is subject to the tax (*i.e.*, a distributor), but it does not define the incidence of the tax. It does not state that the tax is on "distribution."

Before the Washington Supreme Court, the Department of Revenue argued that the use tax in effect prior to that 1955 amendment covered the same kind of transaction which is involved in this case. The Washington Court agreed, saying:

> We concur with the Department that the pre-1955 statute without the 1955 amendment language was sufficient to cover the transactions in this case.

97 Wn.2d at 263, 643 P.2d at 886, Juris. St. at A-4. This Court is bound by that construction.[3]

---

[2]In *Morrison-Knudsen*, the Washington Court stated:

> By the definition, to store an article (as a consumer) or to withdraw it from storage is a "use" of it. According to the evidence, the respondents performed these and other acts of dominion and control over the articles, * * * *

64 Wn.2d at 92, 390 P.2d at 716.

[3]The Washington Court looked at the plain language of the definition of consumer in effect before the 1955 amendment as well as administrative history in the record, which illustrates the pre-1955 administrative construction of the applicability of the use tax to use of catalogs by large retailers, such as Sears.

The 1955 Amendment clarified who should bear the burden of the use tax, the retailer or the customer. It makes no sense to place the burden on the customer, but that is just where it would be placed if Sears prevails here. Currently, the customer's use is exempt from tax as his or her donor, Sears, pays it. RCW 82.12.0252.

So construed, the threshold question for this Court, is whether the general use tax as applied to Sears' storage and withdrawal of storage of its catalogs infringes upon Sears' first amendment rights.

This case is substantially different from the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, No. 81-1839, ___ U.S. ___, 102 S.Ct. 2955 (1982). There, one issue was whether a use tax directed at newspapers, but placing no greater overall burden on newspapers than other publishers, was constitutional. In contrast, here there is no new tax specifically directed at any activity arguably within the first amendment. It is simply a general tax applied (both before and after 1955) to a commercial enterprise which arguably, in the course of that enterprise, engages in certain protected first amendment activity.[4]

However, if there were a shift of the tax down the chain of distribution, Sears nevertheless would be responsible for collecting the use tax on the customer, in the same manner that a retailer collects the sales tax on goods sold to the customer.

RCW 82.12.040 states:

> Every person who maintains in this state a place of business * * * shall, at the time of making sales, or making transfers of either possession or title or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed by this chapter. * * *

In other words, shifting the burden of the tax from Sears to its customers does not change Sears' burden to pay the tax to the State. The only practical difference would be that, if the tax is imposed on Sears' use, the cost of the tax would be spread to all Sears' customers, catalog users as well as others. If the tax is imposed on the catalog users, as argued by appellant, the cost is only spread to them. In sum, the burden imposed on any Sears' first amendment rights by the use tax is no greater than the burden imposed without the tax on Sears.

[4]In footnote 7 of its Jurisdictional Statement, Sears argues that the *Minneapolis Star* case is different from this case in that the Minneapolis Star newspaper was "revenue producing," while the Sears catalogs are distributed free of charge. Such a distinction is puzzling in that the purpose of distribution of Sears catalogs definitely is commercial gain. The fact that they are distributed free makes no difference. Indeed, the cost of the catalogs (and the tax on their use) is passed on to the Sears customers in the form of higher prices of goods sold.

Also present in *Minneapolis Star* was the issue of discrimination in the application of the tax against large newspapers which, according to the appellant in that case, discouraged circulation in violation of the principles set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See Juris. St. at 14-15, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, No. 81-1839.[5] The use tax at issue here is applied equally to all users of catalogs, whether large retailers such as Sears or small retailers. All pay at the same rate.

Sears cites as its primary authority *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944), for the proposition that even a general tax may be unconstitutional if the impact on speech is direct. Juris. St. at 6. Both *Murdock* and *Follett* involved local ordinances requiring licenses, including fees, for the privilege of "canvassing" or "soliciting" (*Murdock*), or "selling books" (*Follett*). Justice Douglas, who wrote the opinion in each case, characterized the license fees as being levied directly on, and as a prerequisite to, acts of speech, *i.e.*, canvassing, soliciting, or selling. *Murdock*, 319 U.S. at 112; *Follett*, 321 U.S. at 578. Justice Douglas distinguished such fees from other general taxes not directed at prerequisites to acts of speech, such as the use tax here at issue, stating:

> We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on *property used* or employed in connection with those activities.

Murdock, 319 U.S. at 112 (emphasis added).[6]

---

[5] In *Buckley*, this Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment * * * *

424 U.S. at 48-49.

[6] The court pointed out in both *Murdock* and *Follett* that a person going door to door distributing religious literature, whether for a price or not, is in a different category than a person going door to door as a

The Court in both *Murdock* and *Follet* cited *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), where the Court, speaking of taxes *directed* at newspapers, said:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

Id. at 250.

Indeed, this Court consistently has rejected appeals from state courts which have upheld nondiscriminatory business taxes on newspapers or other publishing enterprises. *E.g., Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) (gross receipts tax on receipts of an author from grant of licenses to his rights in his literary works); *City of Corona v. Corona Daily Independent*, 115 Cal.App. 2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953) (general business license tax applied to newspapers); *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937) (excise tax on gross proceeds from sale of newspapers).[7]

In sum, this Court consistently has upheld business taxes and regulations[8] which apply generally to all businesses including those exercising first amendment freedoms. It has overturned taxes or license fees as infringements upon first amendment rights only where the tax is *directed at* a business, such as newspapers, engaging primarily in first amendment activity, as in *Grosjean*, or

---

merchant selling his wares. The implication is that the ordinances at issue in *Murdock* and *Follett*, while unconstitutional as applied to a Jehovah's Witness, would be applicable to a Sears salesman selling, or distributing free of charge, Sears catalogs.

[7]This Court dismissed *Giragi* for want of a substantial federal question, citing *Grosjean*, 297 U.S. at 250.

[8]*See Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946).

where the tax is levied on or as a prerequisite to an act of speech, as in *Murdock*. The taxes in *Steinbeck*, *Giragi*, and here did not tax any act of speech, nor were they directed at businesses substantially engaging in first amendment activity.[9]

Even assuming that the *Murdock* license fee is analogous to the Washington use tax, Sears misstates constitutional doctrine when it implies that the courts must analyze whether the impact from the tax is direct or "tangential." There is no such quantum test to be applied.

Grosjean, *Murdock*, and the various state court cases which have considered this question require no inquiry into "effect" if the tax is general. Certainly, every business tax or business regulation imposed on publishers raises the cost of business, thereby increasing the economics of exercise of speech. That burden is what is meant by "tangential" impact. In other words, if the tax is general, the inquiry ends.[10] If any inquiry is relevant, it is limited to whether the tax creates a prior restraint on the speech, as this Court specifically determined in *Murdock*, 319 U.S. at 114. Here, there is no such prior restraint on Sears' activity. There is no governmental permission or license of any kind which is a prerequisite to the exercise of any Sears commercial communications.[11]

Given the state court characterization of the tax here at issue, there is no tax on speech or any act of speech in this case any more than there would be in the case of a

---

[9]Note that in *Corona Daily Independent*, Justices Douglas and Black dissented from the denial of a writ of certiorari, 346 U.S. 833, on the ground that the license fee applied to newspapers was a license on a first amendment activity, citing *Murdock*.

[10]This is particularly true in the commercial speech context where the first amendment offers less protection than in other areas of speech. See pp. 9-10, *infra*.

[11]Sears perhaps would argue that the tax nonetheless "chills" the exercise of Sears' commercial speech rights. However, this Court has consistently noted that because of the character and nature of commercial speech, it is not susceptible of such chilling. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 n. 6 (1980).

retail sales tax on sales of books (or catalogs), or a property tax on bookstores, or a gross receipts tax on publishers of books or newspapers. Accordingly, this appeal should be dismissed for want of a substantial federal question.

ANY ARGUABLE FEDERAL QUESTION IS SO INSUBSTANTIAL THAT THE CASE DOES NOT MERIT CONSIDERATION OR FURTHER ARGUMENT

A. THE COMMERCIAL SPEECH DOCTRINE DOES NOT APPLY TO THIS CASE.

Even if the tax were construed to be of a character similar to the license fees described in *Murdock* and *Follett*, the facts of this case distinguish it. The commercial speech cases previously decided by this Court have arisen primarily in the context of state prohibitions of various forms of communications, primarily advertising for professional services. This Court has recognized that while the offer for sale of certain goods or services is not afforded the same protection as political or other "core" speech,[12] such commercial speech is afforded some constitutional protection from prohibition by the state. Indeed, the cases which have been decided so far all involve complete state bans of such speech. Such bans have been upheld where there is a sufficient state interest, such as an interest to prevent misleading or untruthful advertising but have been overturned where there is no such state interest. Indeed, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court upheld a ban of certain commercial advertising by billboards, justifying the decision on an aesthetic interest of the City of San Diego. In other words, the state interests need not be compelling in order to justify a regulation, or even a prohibition, of commercial speech.

---

[12]*E.g. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976).

The four-part test originally adopted by this court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), if adopted and applied here, should result in an affirmance of the decision below primarily because the state tax system places no greater burden on Sears greater than that placed on other retailers not claiming first amendment protection.

The *Central Hudson* test is as follows:

1. Is the expression protected by the first amendment, i.e., does it cover lawful activity and is it not misleading?
2. Is the government interest substantial?
3. Does the state law advance the government interest asserted?
4. Is the state law more extensive than necessary to serve that interest? 447 U.S. at 566.

Assuming Sears' activity is protected, the Washington use tax passes this test. Revenue raising certainly is an important interest of government. The state use tax advances that interest. Finally, the use tax as applied to Sears is not more extensive than necessary; it is applied at the same rate as all other use taxes.[13]

Lastly, the commercial speech cases have arisen in areas where there is a demonstrated impact that supression of the speech will lead to adverse impacts on the consumers, in the form of higher prices, fewer choices

---

[13]We recognize the *Central Hudson* test was formulated in the context of government regulation, not taxation. Accordingly, given an appropriate case, this Court may not strictly apply this test in the taxation context. However, the basic elements of the test are two: a balancing of the State interests in the governmental action with protected first amendment interests of the business and an assurance that the State law does not single out the affected business for treatment harsher than that given other similarly situated businesses. In this case, the protected interest of Sears, if any, is an ability to communicate price and other information to its customers. The State's interest is revenue from a broad tax base. Given the minimal or non-existent impact of the tax in question on Sears' ability to communicate, *see* n. 3, *supra*, and the lack of discrimination in the application of the tax, the commercial speech doctrine should not void this tax.

in the marketplace, or other similar impacts.[14] Here, there is no such demonstration.

B. THE STATUTE IN QUESTION IS NOT OVERBROAD.

The construction of the tax by the Washington Supreme Court renders any discussion or decision relating to overbreadth unnecessary.

However, should this Court reach the question, it should affirm the decision below in that the overbreadth doctrine simply is not applicable. As indicated in *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973), this Court has recognized only in the rarest of circumstances exceptions to the general rule that a person may not challenge a statute on the ground that it may conceivably be applied unconstitutionally to others. The *Broadrick* decision marked a limitation on, if not a retreat from, the broad overbreadth doctrine articulated in some of the Court's prior cases which have been cited by the appellant.

The overbreadth doctrine allows a person to assert the first amendment rights of others who arguably would never get their day in court because of fear of criminal sanctions "chilling" their first amendment activity. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

Sears here argues that political speech of others may be "chilled" because of a threat of taxation if too many advertisers are included. However, here there are no criminal sanctions. If owners of a business wish to make political statements through a publication and include in that publication advertisements for the sale of goods, but fear that such political speech may result in a tax burden, they have an easy pre-publication remedy. They may seek a declaratory ruling from the Department of Revenue on the taxability of the publication. WAC 458-28-100. Here, the tax in question can relate only to printed

---

[14] *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 754, 763 n. 18, 765 n. 20 (1976) (data on drug price variation).

advertisements, which take some time to prepare and on which consideration can be given by both the taxpayer and the Department of Revenue as to whether or not the messages contained therein constitute protected first amendment speech. The overbreadth doctrine simply is not applicable. Accordingly, this Court need not refine its earlier statements that the "overbreadth doctrine does not apply to commercial speech," *e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___, 102 S.Ct. 1186, 1192 (1982), as suggested by appellant. Juris. St. at 10-11, n. 22.

CONCLUSION

Sears apparently attempts to ride into the Supreme Court on the coattails of *Minneapolis Star & Tribune*. That case presents a substantial federal question for resolution. This case does not, as the Washington Supreme Court construed the tax as one not directed at any act of speech. So construed, whatever federal questions arguably remain may be resolved in favor of the State within existing bounds of constitutional law and policy.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General,
State of Washington,

LELAND T. JOHNSON*

JEFFREY D. GOLTZ

Assistant Attorneys General
Attorneys for Appellees

*Counsel of Record

Temple of Justice
Olympia, Washington 98504
(206) 753-5528

Office - Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-135

IN THE

Supreme Court of the United States

October Term, 1982

SEARS, ROEBUCK AND COMPANY
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

JOHN T. PIPER
D. MICHAEL YOUNG
JAMES H. LOWE
Counsel for Appellants

Office and Post Address:
BOGLE & GATES
2000 The Bank of California Center
Seattle, Washington 98164
Telephone: (206) 682-5151

TABLE OF CONTENTS

Page

I. Introduction 1

II. The State's Argument That The Decision Below Rests On An Adequate Non-Federal Basis Is Contrary to the Record 2

A. The State's "Storage, Withdrawal" Hypothesis Is Contrary to the Record ... 3

B. The Washington Court Did Not Misread the Factual Record as the State Has and Decided a Federal (Not State) Law Question 5

III. The Commercial Speech Doctrine Applies To This Case 5

A. First Amendment Protection Is Not Limited to Total Prohibitions of Speech 5

B. The State's Revenue Interest is Constitutionally Insufficient to Sustain a Tax on Distribution of Commercial Speech 6

IV. Conclusion 7

TABLES OF AUTHORITY

Table of Cases

Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) 7

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) 7

Follett v. McCormick, 321 U.S. 573 (1944) 4

Page

Grosjean v. American Press Co., 297 U.S. 233 (1963) 2

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, No. 81-1839, _____ U.S. _____, 102 S. Ct. 2955 (1982) 4,5

Moffett v. Killien, 360 F. Supp. 228 (D. Conn. 1973) . 7

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 4,6,7

Speiser v. Randall, 357 U.S. 513 (1958) 6

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 6

Constitutional Provisions

U. S. Const. amend. I 1,2,4,5,6,7

Statutes

RCW 82.12.010(2) 3,4

RCW 82.12.010(5) 7

IN THE

Supreme Court of the United States

October Term, 1982

SEARS, ROEBUCK AND COMPANY
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I. INTRODUCTION.

The clash between the State's Motion to Dismiss or Affirm and Sears'[1] Jurisdictional Statement has focused at least three substantial federal questions:

(i) Does a tax imposed directly on protected speech pass First Amendment muster solely by reason of being "general"?

1. A list of Sears' subsidiaries appears in the Jurisdictional Statement at 1, n.1.

(ii) Is a state revenue interest categorically insufficient to outweigh First Amendment protection of commercial speech? Alternatively, is the instant revenue interest insufficient?

(iii) Can a "substantially" protected commercial speaker invoke overbreadth analysis to challenge a statute also infringing *fully* protected speech?

We address here the first two questions to correct what we perceive as errors in the State's treatment of the record. We believe part IV of Sears' Jurisdictional Statement, particularly footnote 22, sufficiently covered the State's contention as to the third question.

II. THE STATE'S ARGUMENT THAT THE DECISION BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS IS CONTRARY TO THE RECORD.

The Washington court upheld the instant tax solely on the ground that: "[T]his is a general tax for the support of government which under the test of *Grosjean v. American Press Co.*, [297 U.S. 233 (1963)], is not violative of the First Amendment." (Juris. Statement at A-4.) The State has endorsed that court's failure to look beyond the "general" nature of the tax: "In other words, if the tax is general, the inquiry ends." (Motion at 8.) Both the court below and the State assert that no analysis as to whether the tax directly (or merely tangentially) impacts speech is necessary.[2] Having thus helped to focus the federal question (whether a tax imposed directly on protected speech is saved solely by being "general"), the State attempts to sidestep that question and to substitute a state law question of statutory construction.

In response to Sears' *alternative* argument that the 1955 amendment "singles out" distribution of speech, the Washington court held that *prior law* would have been

---

2. At the outset of its opinion, the Washington Supreme Court adopted the constitutional principle that "[a] general tax which only tangentially impacts constitutionally protected speech is valid." (Juris. Statement at A-2.) However, that court's subsequent analysis ignored the "tangential impact" requirement.

sufficient to tax Sears' distribution. The court said no more than that, but the State has seized upon that construction to frame an entirely new question for this Court:

> So construed, the threshold question for this Court is whether the general use tax as applied to Sears' *storage and withdrawal of storage* of its catalogs infringes on Sears' First Amendment rights.

Motion to Dismiss or Affirm at 5 (emphasis added).

A. The State's "Storage, Withdrawal" Hypothesis Is Contrary to the Record.

By claiming that the tax was imposed on "storage and withdrawal from storage,"[3] the State attempts to shift this Court's focus from the *distribution* of Sears' written speech to other acts that might, in some cases, be taken prior to such distribution. But there is no factual basis in the record for the *storage and withdrawal* argument. As the parties stipulated, the catalogs were *shipped directly* from the *out-of-state printer* to the local stores for distribution to

---

3. RCW 82.12.010(2) provides:

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state; . . .

customers.[4] The State, in fact, has mentioned storage and withdrawal for the first time in its motion to this Court.[5]

Not only the factual record, but the lower court's decision is devoid of any mention of storage or withdrawal. If the Washington court had intended to distinguish between distribution and such acts preparatory to distribution, one would expect to find some reference to "storage and withdrawal," or the like, somewhere in its opinion. There is no such reference.

---

4. The statute relied on by the State for its "storage and withdrawal" argument applies to the " first act within this state by which the taxpayer takes or assumes dominion and control." RCW 82.12.010(2). It *includes* "storage, withdrawal from storage" as two examples of taking dominion and control. Lacking support in the record for specific acts of "storage, withdrawal," the State would have to retreat to the more general "dominion and control" language of the statute. But that would require that this Court draw an untenable line between the *distribution* of written speech and the "dominion or control" manifested by that distribution.. Acceptance of such a semantic distinction would eviscerate the First Amendment. It is impossible to distribute commercial (or any other) literature without taking "dominion or control" over it. Even "storage and withdraw" (had they occurred) preparatory to distribution would be indistinguishable from the distribution itself.

Indeed, a tax on taking control of literature to effect distribution cannot be reconciled with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) or *Follett v. McCormick*, 321 U.S. 573 (1944). The State distinguishes *Murdock* and *Follett* as involving license taxes "directed at prerequisites to acts of speech." (Motion at 6.) How would the State characterize "tak[ing] dominion and control" of printed material for distribution if not as a "prerequisite to acts of speech"?

5. In attempting to distinguish *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, No. 81-1839, _____ U.S. _____, 102 S. Ct. 2955 (1982), the State has glossed over its "storage and withdrawal" contention. The tax there was on the consumption of paper and ink to produce a newspaper subsequently sold to the public. If, as the State asserts, the tax here were on "storage and withdrawal" for distribution, the instant tax would impact speech at a stage closer to actual distribution than does the Minnesota tax. Under the State's own argument, the presence of a substantial federal question in the *Minneapolis Star* case logically indicates, *a fortiori*, the presence of such a question in the instant case.

The State also asserts that it makes no difference that the Minneapolis Star newspaper is revenue-producing, while Sears' catalogs are distributed

B. The Washington Court Did Not Misread the Factual Record as the State Has and Decided a Federal (Not State) Law Question.

The Washington court held that the tax is constitutional, even though it was imposed on the distribution of catalogs. The State has badly mischaracterized that as a holding that the Washington tax was not imposed on the distribution of catalogs.[6]

Both the Washington Supreme Court and the superior court framed the issue in terms of "use taxes paid for [Sears'] *distribution* of catalogs." (Juris. Statement, A-1, A-7 (emphasis added).) It is the distribution—the act of speech itself—whose taxation invokes this Court's jurisdiction.

III. THE COMMERCIAL SPEECH DOCTRINE APPLIES TO THIS CASE.

A. First Amendment Protection Is Not Limited to Total Prohibitions of Speech.

The State argues that a tax on commercial speech lies outside the ambit of First Amendment protection because this Court's commercial speech decisions "all involve complete state bans of such speech." (Motion at 9.) This Court has placed no such limitation on commercial speech

---

Footnote 5 (con't)

free of charge. (Motion at 5, n.4.) Sears has consistently acknowledged that the *privilege of selling* written speech is a legitimate incident of taxation. (Juris. Statement at 5, n.5.) The selling privilege may be a pertinent factor in the *Minneapolis Star* case; it is absent here.

6. Contrast the Washington court's own expression of its holding with the State's characterization:

> The Court:
>
> We believe the record and the history regarding the application of the use tax to the Sears catalogs demonstrates this is a general tax for the support of government which under the test of *Grosjean v. American Press Co., supra*, is not violative of the First Amendment. Since this is the nature of the tax, there is no constitutional issue involved. Therefore, it is unnecessary to consider whether the "commercial speech" which Sears claims it is exercising is afforded First Amendment protection or whether the statute is constitutionally overbroad . . . . (Juris. Statement at A-4-5).

protection. Moreover, the fact that a tax on commercial speech presents a *novel* question is hardly a ground for declining to exercise jurisdiction.

This Court has recognized that a direct tax on speech is tantamount to a total ban and has refused to permit such taxes: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). The instant tax is not merely a regulation of time, place or manner, but applies at *all times* and *all places* to *all manner* of commercial catalog distributions. Such a tax is tantamount to a ban because it has exactly the same effect on those who cannot afford it or find it uneconomic to pay.[7] That is why this Court has consistently struck down direct taxes as well as outright bans on protected speech.

B. The State's Revenue Interest is Constitutionally Insufficient to Sustain a Tax on Distribution of Commercial Speech.

A tax on a First Amendment right bears a heavy presumption *against* its constitutionality. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). This Court has never permitted taxation of protected speech merely for revenue purposes.[8]

Footnote 6 (con't)

The State:

> Because the Washington court determined that the tax in question was not one levied upon an act of speech, including any act of distribution of catalogs, the Washington court upheld the tax without reaching the commercial speech or overbreadth issues raised by Sears. (Motion at 2).

7. Consumers also have a stake in "the free flow of [commercial] information" necessary to make informed economic decisions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (competitive drug price information). Sears' catalog advertising provides consumers with competitive price and quality information on a wide variety of goods, including medical supplies, hearing accessories, orthopedic and arthritic devices, and health and safety aids, as well as clothing and other basic necessities. Moreover, Sears' catalog makes such information and products available to persons who, for physical or geographic reasons, may be otherwise unable to obtain them.

8. In striking down general revenue taxes on speech, the courts have consistently distinguished a "nominal fee" to defray the cost of

In the context of commercial speech, the four-part test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980), requires that the challenged state law advance a "substantial" government interest. In its Motion at 10, the State asserts merely that revenue "from a broad tax base" is "an important interest of government." While the basic use tax does indeed provide revenue from a broad tax base, the use tax as generally applied is not at issue. Only the *extension* of the use tax to distributors of catalogs, and only the *incremental* revenue generated by that extension, are at stake here.[9] A less substantial government interest can scarcely be imagined.

IV. CONCLUSION

The constitutional questions on appeal are substantial. The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

JOHN T. PIPER*
D. MICHAEL YOUNG
JAMES H. LOWE
of Bogle & Gates
Attorneys for Appellant
**Counsel of Record*

Footnote 8 (con't)

administering legitimate regulation of First Amendment activity. *See Murdock*, 314 U.S. at 113-14; *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696, 704 (M.D. Fla. 1978); *Moffett v. Killien*, 360 F.Supp. 228, 231-32 (D. Conn. 1973) (three-judge court).

9. Sears challenges RCW 82.12.010(5) as invalid on its face. If, as the State contends and the Washington court held, the use tax would apply to commercial catalog distribution even without the extension of RCW 81.12.010(5), then the use tax is invalid as applied to such distribution.